ASIA TELEVISION LIMITED & ANOR.

v.

VIWA VIDEO SDN. BHD.

HIGH COURT MALAYA, IPOH
AJAIB SINGH J
[CIVIL SUIT NO. 474 OF 1983]
15 AUGUST 1983

CIVIL PROCEDURE: *Interim injunction - Anton Pillar order - Application to set aside order and for recovery of goods surrendered - Whether inter partes application for injunction proper - Whether applicants had copyright - Infringement of Films (Censorship) Act - Effect of.*

On 10 June 1983, the plaintiffs obtained an interim injunction in the nature of an Anton Pillar order on an *ex parte* application regarding cinematograph films in the form of video tapes over which the plaintiffs claimed copyright. The defendants were also ordered to deliver the said tapes to the plaintiffs. A total of 84 video tapes and 24 record cards were handed over by the defendants. The defendants applied to have the injunction set aside and for the return of the video tapes and record cards. They contended that the application for the injunction should have been made *inter partes* and that the plaintiffs had no copyright in the cinematograph films contained in the video tapes as they had infringed the provisions of the Films (Censorship) Act 1952.

Held:

[1] When the plaintiffs made the application they had by evidence on affidavit shown a strong *prima facie* case for the granting of the injunction and there was no merit in the contention that the application should have been made *inter partes*.

[2] The plaintiffs, however, had blatantly contravened the Films (Censorship) Act as they had failed to obtain a certificate of approval within 30 days of the publication of the films in Hongkong and had committed an offence punishable under the Films (Censorship) Act. As a matter of public policy the publication of a film ought not to be held valid within the meaning of the relevant provisions of the Copyright Act unless the film is first approved by the Board of Film Censors.

[3] The plaintiffs, therefore, had no copyright in the cinematograph films contained in the video tapes and were in no position to maintain any action for infringement of copyright in respect of those films. In certain circumstances copyright is conferred on literary and other works if these qualify as first publications in Malaysia but the first publications must be lawful publications.

[Interim injunction set aside. Video tapes and record cards ordered to be returned to defendants.]

For the plaintiffs - S.F. Wong; M/s. Shearn Delamore & Co.
For the defendants - Davidson (H. Paul with him) M/s. Azman, Davidson & Co.

JUDGMENT

Ajaib Singh J:

On 10 June 1983 the plaintiffs obtained an interim injunction in the nature of an Anton Pillar order on an *ex parte* application restraining the defendants from reproducing, disposing renting or hiring out for private or domestic viewing or publicly exhibiting cinematograph films in the form of video tapes over which the plaintiffs claimed copyright. The defendants were also ordered to give a full account of all the infringing copies of the video tapes in their possession, custody or control and to deliver and surrender the said tapes to the plaintiffs. The injunction was served on the defendants the same day whereupon a total of 84 video tapes containing the cinematograph films of the plaintiffs and 24 record cards were handed over by the defendants to the representatives of the plaintiffs.

The defendants have now applied to set aside the injunction and for the return of the 84 video tapes and the 24 record cards. The defendants say that as there were serious questions of fact and law to be tried the application for the injunction should have been made *inter partes* and not *ex parte* so that they would have got an opportunity to be heard on the application. The defendants submit that there was no urgency in obtaining the injunction as the defendants were not intending to dispose their goods or abscond. They complain that a great deal of inconvenience, hardship and financial loss has been caused to them as a result of the injunction. The defendants also contend that the plaintiffs have no copyright in the cinematograph films contained in the video tapes because the plaintiffs had infringed the provisions of the Films (Censorship) Act 1952.

Copyright for eligible works subsists by virtue of the Copyright Act 1969 and not otherwise which means that any claim for copyright in any such work must come within the provisions of the Copyright Act. Literary, musical and artistic works, cinematograph films, sound recordings and broadcasts are all eligible for copyright. Copyright is conferred on every such work of which the author is, at the time when the work is made, a Malaysian citizen or a permanent resident in Malaysia or a body corporate established in Malaysia.

Copyright is also conferred on literary, musical and artistic works and cinematograph films made in a foreign country if these works are first published in Malaysia. In the event that such a work is first published in any foreign country a subsequent publication in Malaysia is treated as the first publication in Malaysia if it takes place within thirty days of the earlier publication elsewhere.

The first plaintiffs claim to be the makers and owners of the cinematograph films contained in the video tapes in question and the second plaintiffs claim to be the licencees of the first plaintiffs in Malaysia with authority to distribute by way of rental or hire for private or domestic use the video tapes belonging to the first plaintiffs. The plaintiffs claim that the films contained in these video tapes were first published in Hongkong and they claim first publication thereof in Malaysia on the ground that the films were published here within one month of their publication in Hongkong.

Infringement of copyright is actionable at the instance of the owner of the copyright who may claim damages, injunction and an account of the profits in respect of the infringement. The plaintiffs are making all these claims against the defendants in a writ of summons which they have filed in Court and pending the hearing and determination of their suit they obtained the interim injunction on 10 June 1983.

When the plaintiffs made the application on 10 June 1983 they appeared to have satisfied all the requirements for the issue of the injunction against the defendants. They had contended that they were the owners of the copyright in respect of the cinematograph films contained in the video tapes, that the defendants had infringed their copyright and were selling and hiring out inferior copies of the video tapes to the public and thereby damaging the business and integrity of the plaintiffs and that it was necessary for the protection of the legitimate business of the plaintiffs that the defendants should be stopped from selling or disposing or renting out the tapes.

The plaintiffs had by evidence on affidavit shown a strong *prima facie* case for the granting of the injunction. There was sufficient evidence also to show that the plaintiffs were likely to suffer serious and irreparable damage to their business unless the injunction was granted. There was also sufficient evidence that the defendants had the infringing copies of the video tapes in their possession and that there was a real possibility that the defendants might put the said tapes out of the reach of the plaintiffs if they got wind of any application for an injunction. The application was therefore rightly made *ex parte* so as not to give any chance to the defendants to erase the films in the video tapes or hide away the tapes before the plaintiffs could lay hands on them in enforcing the injunction.

I do not think there is any merit in the contentions advanced by the defendants in the application to set aside the injunction except on one important point which they have raised on the question of the publication of the films in the video tapes under the Copyright Act 1969 taken in conjunction with the Films (Censorship) Act 1952.

The Films (Censorship) Act 1952 provides for the censorship of films and these include cinematograph films and video tapes. The owners of local and foreign films are required to comply with the provisions of the Films (Censorship) Act and obtain the necessary certificates of approval from the Board of Film Censors established under the Act before any film is exhibited in Malaysia. It is an offence punishable with a fine not exceeding RM10,000 to exhibit, sell, hire or distribute any film in respect of which the requisite certificate has not been issued by the Board. The mere possession of such a film without lawful excuse is also punishable with the maximum fine of RM10,000.

To be conferred with copyright on foreign work which is eligible for copyright such as a literary, musical or artistic work or cinematograph films there must be a first publication thereof in Malaysia. And if the publication in Malaysia takes place within thirty days of an earlier publication elsewhere it is treated as the first publication. But the publication here in Malaysia must be lawful publication. When the cinematograph films contained in the video tapes in the present case were published in Malaysia within thirty days of their publication in Hongkong no certificate of approval had been issued in respect of the films by the Board of Film Censors. In the absence of such certificate there was no valid publication of the films within the provisions of the Copyright Act.

The publication of the films in the video tapes by the plaintiffs was unlawful, illegal and constituted an offence punishable under the Films (Censorship) Act. The plaintiffs having blatantly contravened the censorship laws of Malaysia show no qualms whatsoever in now seeking redress for infringement of something which is tainted with illegality. This is a wholly unmitigating stance adopted by the plaintiffs which cannot be sustained or condoned. As a matter of public policy the publication of a film ought not to be held valid within the meaning of the relevant provisions of the Copyright Act unless the film is first approved by the Board of Film Censors. Public interest requires that the public at large do not gain access to immortal, subversive or undesirable films and it is for this purpose that all films are subject to censorship before they are released for public viewing.

In my judgment therefore and for the reason I have stated the cinematograph films contained in the video tapes in this case belonging to the plaintiffs have no copyright. The plaintiffs are thus in no position to maintain any action for infringement of copyright in respect of these films. The interim injunction is set aside and the 84 tapes and the 24 record cards are to be returned to the defendants forthwith.

Also found at [1983] 2 CLJ 132